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2 Sisters Food Group, Inc. and Fresh & Easy Neighborhood Market, Inc. and United Food and Commercial Workers International Union, Local 1167. Cases 21–CA–038915 and 21–CA–038932

July 16, 2013

SUPPLEMENTAL DECISION AND ORDER

**BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK**

On December 29, 2011, the Board issued a Decision and Order finding that Respondent 2 Sisters Food Group, Inc. violated Section 8(a)(1) and (3) of the Act. 357 NLRB No. 168. On November 21, 2012, Administrative Law Judge Eleanor Laws issued the attached supplemental decision in this compliance proceeding. Respondent Fresh & Easy Neighborhood Market, Inc. filed exceptions and a supporting brief, the Charging Party filed exceptions, the Acting General Counsel filed an answering brief to Respondent Fresh & Easy's exceptions, and Respondent Fresh & Easy filed an answering brief to the Charging Party's exceptions.

The National Labor Relations Board¹ has considered the supplemental decision and the record in light of the exceptions and briefs² and has decided to affirm the

¹ Respondent Fresh & Easy contends that the Board lacks a quorum because the President's recess appointments of two current Board members were constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that these appointments were not valid, see *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12-1281), and that the Third Circuit has concluded that the Constitution's Recess Appointments Clause permits only intersession appointments, albeit using a different analysis than the District of Columbia Circuit, see *NLRB v. New Vista Nursing & Rehabilitation*, 2013 WL 2099742, __ F.3d __ (3d Cir. May 16, 2013). However, as the D.C. Circuit itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals, see *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962), and the subsequent Third Circuit decision is in conflict with *Evans*, supra. This question remains in litigation and the Supreme Court has granted the Board's petition for certiorari in *Noel Canning*. Pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013).

² The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision.³

ORDER

The National Labor Relations Board orders that Respondent 2 Sisters Food Group, Inc., Riverside, California, and its successor, Respondent Fresh & Easy Neighborhood Market, Inc., Riverside, California, their officers, agents, successors, and assigns, shall take the action set forth in the Board's Order in 357 NLRB No. 168, slip op. at 8–9 (2011).

Dated, Washington, D.C. July 16, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ The only issue that was appropriately before the judge in this proceeding was Respondent Fresh & Easy's claim that, notwithstanding its status as a successor to 2 Sisters Food Group under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), it was not liable to remedy 2 Sisters' unfair labor practices because the compliance specification was untimely and the Region's failure to allege Fresh & Easy as a respondent in the unfair labor practice proceeding denied it due process of law. We find that the judge correctly rejected this argument, and we adopt her findings and conclusions on this issue.

The Charging Party has excepted, however, to the judge's failure to grant numerous additional remedies. These remedies could have been but were not sought at the unfair labor practice stage of this case. They cannot properly be raised at the compliance stage. *Wellstream Corp.*, 321 NLRB 455, 455 fn. 2 (1996). Therefore, we disavow the judge's consideration of the Charging Party's proposed remedies as well as her issuance of a revised Order and additional separate notices to employees. The Order that the Board issued in the underlying unfair labor practice proceeding is fully binding on 2 Sisters as the original respondent and on Fresh & Easy as its successor. Accordingly, we shall order the Respondents to take the action set forth in that Order.

Irma Hernandez, Esq., for the Acting General Counsel.

Joseph A. Turzi, Esq. (DLA Piper LLP), for Respondent Fresh & Easy Neighborhood Market, Inc.

Stuart Newman, Esq. (Seyfarth Shaw LLP), for Respondent 2 Sisters Food Group, Inc.

David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld), for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts I approved on August 1, 2012, pursuant to a Compliance Specification and Notice of Hearing (Compliance Specification) issued on May 21, 2012. The issue presented is whether Fresh & Easy Neighborhood Market, Inc. (Fresh & Easy) can be held jointly and severally liable for 2 Sisters Food Group, Inc.'s (2 Sisters) unfair labor practice violations.

On the entire record and after considering the briefs filed by the Acting General Counsel, the Charging Party, and Respondent Fresh & Easy,¹ I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Fresh & Easy, a Delaware corporation, engages in the retail sale of groceries, meats, and related products at various facilities in the State of California, where it annually derives gross revenues in excess of \$500,000 and purchases goods valued in excess of \$50,000 from points outside California. Fresh & Easy admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act) and that the Union is a labor organization within the meaning of Section 2(5) of the Act.²

A. Background and Procedural History

This case has a protracted procedural history, the pertinent points of which I will summarize. Pursuant to unfair labor practice charges and timely objections to a representation election of July 17, 2009, filed by United Food and Commercial Workers International Union, Local 1167 (the Union or the Charging Party), the Regional Director for Region 21 of the National Labor Relations Board (the Region and the Board, respectively) issued a Report on Challenged Ballots and Objections in Case 21–RC–021137, an Order Consolidating Cases 21–CA–038915 and 21–CA–038932, and a Complaint and Notice of Hearing (the complaint) on December 14, 2009. The complaint alleged that 2 Sisters violated Section 8(a)(3) and (1) of the Act. Administrative Law Judge (ALJ) Lana H. Parke presided over the trial of the consolidated case on various dates in March 2010 and issued a decision on June 10, 2010. JD(SF)–24–10. Judge Parke found that 2 Sisters violated the

Act as alleged by maintaining overbroad work rules and by terminating employee Xonia Trespalcacios for her union activities. Accordingly, she ordered rescission of the rules and reinstatement of Trespalcacios with backpay and other make-whole relief. Judge Parke further determined that 2 Sisters engaged in objectionable conduct that impacted the outcome of the union representation election. She set aside the election and ordered 2 Sisters to conduct a rerun election.³

Fresh & Easy purchased all the assets from 2 Sisters' Riverside plant on June 28, 2010. On July 23, 2010, 2 Sisters filed with the Board exceptions to Judge Parke's decision along with a supporting brief. The Acting General Counsel filed limited exceptions and a supporting brief on July 26, 2010. On July 27, 2010, Fresh & Easy filed a motion to intervene and supplement the record. It argued, in basic terms, that the Board could not order the rerun election because it was based on a stipulated election agreement between 2 Sisters and the Union to which Fresh & Easy was not a party. Fresh & Easy further contended that even if it is a successor to 2 Sisters under the Supreme Court's decision in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), it could not be held liable for 2 Sisters' objectionable conduct. A declaration from Hugh Cousins, Fresh & Easy's chief human resources officer, was attached to the motion. Cousins declared, inter alia, that the terms and conditions of employment Fresh & Easy offered to employees were significantly different than those 2 Sisters had provided.

On December 29, 2011, the Board issued a decision unanimously affirming Judge Parke's recommendation to set aside the election. The Board further adopted Judge Parke's findings that 2 Sisters violated Section 8(a)(1) and (3) of the Act by discharging Trespalcacios and violated Section 8(a)(1) by: (1) maintaining an overly broad rule prohibiting the unauthorized solicitation of contributions; (2) maintaining an overly broad rule prohibiting the unauthorized distribution of written materials; (3) maintaining a rule that employees may be disciplined for the "inability or unwillingness to work harmoniously with other employees"; and (4) requiring employees to submit all employment-related disputes to arbitration.⁴ *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011). It also denied without prejudice Fresh & Easy's motion to intervene, finding that the facts asserted in Cousins' declaration were not relevant to its determination that the election must be set aside or to disposition of the complaint allegations. The Board noted that Fresh & Easy could renew the motion before the Regional Director in connection with subsequent proceedings under Section 102.48(d)(1) of the Board's Rules and Regulations. Id. at 10. Finally, the Board ordered 2 Sisters to take various remedial actions and directed it to undertake a second representation election. Id. at 12.

On January 27, 2012, the Region sent a letter to Fresh & Easy's counsel asking whether it intended to intervene in the representation case, Case 21–RC–021137. Fresh & Easy re-

¹ 2 Sisters did not file a brief.

² I take notice that the ALJ and the Board found that, for the time period relevant to the unfair labor practices complaint, 2 Sisters was an employer engaged in commerce for purposes of jurisdiction under the Act.

³ Judge Parke issued an erratum on June 25, 2010, correcting a portion of her order.

⁴ The Board reversed the ALJ and found lawful a rule prohibiting leaving the plant or taking breaks without permission.

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plied that it did not intend to intervene because that case involved a dispute to which it was not a party.⁵

The Region issued the compliance specification at issue herein on May 1, 2012, naming Fresh & Easy as a Respondent along with 2 Sisters, and alleging that Fresh & Easy, as a successor to 2 Sisters, is jointly and severally liable for remedying 2 Sisters' unfair labor practices.

Fresh & Easy filed a motion to dismiss the compliance specification on June 6, 2012. It argued that the compliance specification was untimely, the Region failed to allege facts sufficient to demonstrate that Trespalacios was entitled to employment with Fresh & Easy or backpay from it, and that imposition of successor liability would deprive it of its Constitutional due process rights. The Acting General Counsel and the Charging Party filed respective oppositions. The Board denied Fresh & Easy's Motion to Dismiss on July 9, 2012, and Fresh & Easy withdrew the Motion that same day. On July 10, 2012, the Board, through Associate Executive Secretary Farah Z. Queshi, served the parties with a letter acknowledging receipt of Fresh & Easy's notice of withdrawal of the Motion to Dismiss and informing them that the withdrawal request was moot.

On July 30, 2012, the parties executed a joint stipulation settling all issues regarding of Trespalacios' reinstatement and backpay. Specifically, 2 Sisters agreed to tender full backpay and to remove from its files any reference to Trespalacios' termination, and Trespalacios waived her right to reinstatement. The same day, the parties entered into a joint stipulation of facts and motion to submit the case on stipulation (the stipulations). I approved stipulations on August 1. The Acting General Counsel, Fresh & Easy, and the Charging Party each submitted briefs on September 5. The Acting General Counsel submitted a motion to rescind approval of the settlement stipulation on October 1, asserting that 2 Sisters had not complied with its terms. On October 11, I issued an Order to Show Cause as to why the Acting General Counsel's motion to rescind should not be granted. On October 15, the Acting General Counsel requested withdrawal of its motion to rescind because 2 Sisters subsequently complied. I granted this request on October 16.

B. Stipulated Facts

The stipulated background facts are set forth fully in the joint stipulation of facts but are summarized here for ease of reference. From around 2008 until June 28, 2010, 2 Sisters sold meat and related food products exclusively to Fresh & Easy. On June 28, 2010, Fresh & Easy, aware of the alleged unfair labor practices involving 2 Sisters at issue herein, purchased 2 Sisters' Riverside, California meat processing plant and all its assets. Fresh & Easy continued 2 Sisters' business without interruption and without substantial operational changes. The meat pro-cessing plant operates at the same location, and it is substantially the same with regard to the departments it houses,

equipment it uses, the products it produces, and the customers it serves.

Fresh & Easy made employment offers to all hourly and salaried employees who had worked at the 2 Sisters' Riverside facility. On or around June 28, 2010, a majority of the former 2 Sisters employees began working at the Fresh & Easy Riverside facility. Their duties, wages, and benefits, supervisors and managers, and working conditions remained substantially the same.

The parties stipulated, and I also find, the facts set forth in the joint Stipulation are sufficient to establish that Fresh & Easy is a successor to 2 Sisters under *Golden State*, supra.

II. THE PARTIES' POSITIONS

A. The Acting General Counsel

The Acting General Counsel contends that Fresh & Easy is a *Golden State* successor to 2 Sisters and is therefore jointly and severally liable for remedying the unfair labor practices 2 Sisters committed. The Acting General Counsel further asserts that the compliance specification was issued in a timely manner and that Fresh and Easy was afforded due process of law.

B. The Union

The Union joins the Acting General Counsel's position. The Union further asserts that the Board should issue a broad remedial order against Fresh & Easy and require enhanced notice posting because of its repeated violations of the Act.

C. Fresh & Easy

Fresh & Easy contends that the compliance specification must be dismissed because it was untimely under Section 10(b) of the Act. It further argues that Fresh & Easy cannot be held liable for 2 Sisters' unfair labor practice violations because, as a result of the Region's failures, it was denied due process of law and was unable to defend itself.⁶

D. 2 Sisters

2 Sisters asserts that, as of June 28, 2010, it has no authority to remedy the unfair labor practices, as it no longer controls the operations of the Riverside meat processing facility. It has fulfilled its obligation to Trespalacios by paying her full backpay, and requests to be dismissed out of compliance proceedings entirely.

III. DECISION AND ANALYSIS

A. Timeliness of the Compliance Specification

Fresh & Easy argued that the compliance specification was not timely in its June 6, 2012 Motion to Dismiss filed with the Board. In denying the motion, the Board stated that Fresh & Easy "failed to establish there are no genuine issues of material fact warranting a hearing, or that there is any other basis on which the Compliance Specification should be dismissed."

⁵ Fresh & Easy notes that it was not invited to intervene in the current case, as it was in the representation case. It was named as a Respondent, however, so it would not have made sense for the Region to invite it to intervene.

⁶ Fresh & Easy also disavows liability for any backpay owed to Trespalacios from June 2010 forward. Because the settlement agreement disposed of all reinstatement and backpay issues with regard to Trespalacios, I need not address this argument. I note that Fresh & Easy likewise did not address this argument in its brief.

(Emphasis added.) As Fresh & Easy presented no new evidence or arguments regarding the compliance specification's timeliness, I find that the Board has ruled on the matter. Any arguments that the ruling was erroneous are properly addressed to the Board.

B. Due Process of Law

In *Golden State Bottling Co. v. NLRB*, supra, the Supreme Court held that a bona fide purchaser of a business who knows about the seller's unfair labor practices at the time of the purchase and who continues the business without interruption or substantial change in operations, employee complement, or supervisor/manager personnel is jointly and severally liable for the seller's unfair labor practices. As noted above, I find and the parties have stipulated that Fresh & Easy is a successor to 2 Sisters under *Golden State*.

By the time Fresh & Easy purchased 2 Sisters, the ALJ decision on the unfair labor practices complaint had issued, and the case was pending before the Board. Fresh & Easy filed a Motion to Intervene.⁷ The Board denied the Motion to Intervene and therefore any arguments that this was erroneous are properly addressed to the Board.

Regardless of the Motion to Intervene, Fresh & Easy contends that it should not be liable as a *Golden State* successor because, despite the Region's awareness that Fresh & Easy purchased 2 Sisters in June 2010, it did not amend its pleadings to name Fresh & Easy as a Respondent. Because it was first named as a Respondent in the May 2012 compliance specification, Fresh & Easy asserts that imposing liability on it violates its due process rights because it was unable to participate in the appeal of the ALJ decision.

The Board was faced with a similar argument years ago in *Alexander Milburn Co.*, 78 NLRB 747 (1948). The trial examiner in *Alexander Milburn* issued an intermediate report on August 21, 1944, finding that the company had violated the Act. The Board then learned, during oral argument before it on December 14, 1944, that Alexander Milburn had sold its assets to the Black Company after the trial examiner had issued his intermediate report. The Black Company was not represented at the oral argument before the Board. The Board nonetheless issued a Decision and Order on June 18, 1945, finding various unfair labor practices. On July 26, 1946, it issued an Order Reopening Record for the limited purpose of receiving evidence respecting:

- (1) The relationship between the respondent and the Black Company;
- (2) The relationship between the business conducted by the respondent and the business conducted by the Black Company;
- (3) The full circumstances of the sale or other transfer of the business and/or physical assets from the respondent to the Black Company, including any knowledge or notice of the

Black Company concerning the unfair labor practices or the proceedings herein;

(4) The responsibilities of the respective companies for remedying the unfair labor practices found in the Board's Decision and Order; and remanded the proceeding to the Regional Director for the purpose of conducting a further hearing.

Id. at 758.

The Black Company argued that the Board could not proceed against it in a compliance proceeding because it had not issued a complaint or amended complaint against it prior to issuing its Order. The Board disagreed, stating in relevant part:

The Board does not contend that the Black Company has itself engaged in any unfair labor practices, except insofar as its failure to remedy the unfair labor practices of its predecessor constitutes a violation of the Act. Whatever responsibility attaches to it arises out of operation of law from its relationship to the respondent and the circumstances surrounding the transfer of the business enterprise. Under these circumstances it would be idle for the Board to issue a complaint, or amended complaint, against the Black Company. The requirement of due process does not entail providing a successor with an opportunity to defend against unfair labor practices committed by its predecessor prior to a transfer of the business enterprise involved. If this were so, there would, as the Court has said, be "no end to litigation." The contention of the Black Company that it has been denied the opportunity of defending "against the Board's contention that unfair labor practices were in fact committed" is therefore found to be without merit.

Id. at 769.

The procedures were slightly different when *Alexander Milburn* was decided, but the respective procedural postures and arguments are analogous. Though *Alexander Milburn* was overruled by *Syms Grocer Co.*, 109 NLRB 346 (1954), *Syms Grocer* was subsequently overruled by *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. sub nom. *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968), which expressly cites *Alexander Milburn* with approval. Id. at 970 fn. 2; see also *Web Tractor & Equipment Co.*, 181 NLRB 230, 234-235 (1970), enfd. 80 LRRM 2738 (9th Cir. 1972); *Armitage Sand & Gravel*, 203 NLRB 162 (1973).

Moreover, in *Frederick Iron & Steel*, 303 NLRB 514 fn. 1 (1991), and *VSI-Technologies*, 300 NLRB 95 (1990), even when the alleged potential successors were named in the original complaint as successors, the Board granted summary judgment against the employers that committed the unfair labor practice for their respective failures to file answers, noting that the potential successors will be able to litigate their status as successors responsible for remedying the unfair labor practices of the predecessors at the compliance stage. See also *Marine Mach. Works*, 243 NLRB 1081 fn. 1 (1979), enfd. 635 F.2d 522 (5th Cir. 1981).

Citing to *NLRB v. I.W.G., Inc.*, 144 F.3d 685, 689 (10th Cir. 1998), Fresh & Easy asserts that Constitutional due process "prohibits enforcement of the Board's decision if it is based on a violation neither charged in the complaint not litigated at the

⁷ The Motion to Intervene focused on the representation case, but the Board ruled broadly that the evidence to support the motion was "not relevant to its determination that the election must be set aside or to disposition of the complaint allegations." (Emphasis added.)

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hearing.” This is true, but in *NLRB v. I.W.G.*, the company was not given notice and an opportunity for a hearing as to whether it was an alter ego of the company that committed the unfair labor practices. No similar deficiency exists here. It further cites to *Sam’s Club v. NLRB*, 173 F.3d 233, 246 fn. 14 (4th Cir. 1999), but that case involved the adequacy of notice for new charges stemming from new alleged violations the Government contended were like or related to prior charges. That situation is procedurally distinct from the situation here, where there are no new unfair labor practice charges but rather a determination of who may be held liable for the very unfair labor practices the Board has found.

Fresh & Easy attempts to exempt itself from liability associated with *Golden State* successorship by assigning fault to the Acting General Counsel for failing to timely amend the complaint to name it as a respondent. More specifically, in its brief, Fresh & Easy asserts that “given the Region had unequivocal notice of the purchase through the Motion to Intervene, it is clear that its decision to proceed solely against 2 Sisters was a product of inexcusable neglect, or even more troubling, a desire to gain a strategic advantage in the appeal proceedings.” But, as is clear from the cases cited above, Fresh & Easy did not have a due process right to participate in an appeal of the ALJ’s findings regarding unfair labor practices that it did not allegedly commit. As such, this argument fails, as no right was foreclosed by the Region’s failure to amend.

To support its argument that it was prejudiced by the Region’s failure to amend the complaint, Fresh & Easy points to *Viking Industrial Industry Security, Inc. v. NLRB*, 225 F.3d 131 (2d Cir. 2000). In that case, the Board had found that two companies, Viking New York and Viking New Jersey, operating as a single employer, terminated an employee in violation of the Act. The companies later severed, and the complaint was issued only against Viking New York. The court found this violated Viking New Jersey’s due process rights. In the instant case, Fresh & Easy was never alleged to have terminated anyone or to have committed any unfair labor practice previously adjudicated by the ALJ or the Board. The employer’s right to defend its own actions was at stake in *Viking Industrial* but not here. Fresh & Easy also points to *Green Construction*, 271 NLRB 1503 (1984). That case, however, involved a potential single employer the Acting General Counsel knew about at the time of the unfair labor practices hearing and is thus distinguishable. Fresh & Easy cites to other cases, but none of them are directly on point to the situation here, which is governed by *Golden State* and its progeny.

Finally, Fresh & Easy asserts that because it was a successor to, not an alter ego of, 2 Sisters, “imposition of derivative liability is wholly inappropriate” in part because it does not share an identity of interest with its predecessor. *Golden State*, however, governs this situation and instructs otherwise. Fresh & Easy was made a party to the supplemental backpay specification proceeding, given notice of the hearing, and afforded full opportunity, with the assistance of counsel, to contest the question of its successorship for purposes of the Act, rendering derivative liability appropriate. *Golden State*, supra at 181.

C. 2 Sisters’ Request for Dismissal from Compliance Proceedings

2 Sisters asserts that, because it made Trespalacios whole and it no longer operates the Riverside facility, it has done what it can and has no ongoing liability. As 2 Sisters settled the reinstatement/backpay issues, any remaining liability would consist of posting/distributing the Board’s notice and rescinding the unlawful rules and policies it maintained.

Because, as set forth below, I agree with the Charging Party that the Board’s notice should be mailed to any employees who worked for 2 Sisters at the time of the violations but who no longer work for Fresh & Easy, I find that 2 Sisters should remain a party. Moreover, while Fresh & Easy notes in its brief that, as of June 28, 2010, 2 Sisters “was ceasing all operations in the United States,” this fact has not established by stipulation or otherwise. As such, to the extent 2 Sisters still operates in the United States and was found to have been within the Act’s jurisdiction at the time of the instant labor practices in connection with the compliance specification herein, it is required to remedy those violations.

D. The Union’s Request for Additional Remedies and a Broad Remedial Order

1. Additional remedies

The Union asserts that I should impose additional remedies on the Respondents because of their repeated violations of the Act. Specifically, it requests extended notice posting, for a period defined as the amount of time between the complaint allegation and the remedy, or should this not be deemed appropriate, a period of 1 year. The Union further asserts that the Respondents should be required to post the Boards proposed notice to employees for 5 years. Next, the Union requests that the Respondents should be required to mail and email the notice to all employees who worked from the time of the unfair labor practices until the notice is posted. Finally, the Union requests that the Respondents should participate in a meaningful program to educate workers about their rights.

Turning to the first argument, the Union has provided no legal support or convincing argument for extending the notice-posting time. The employees who now work for Fresh & Easy are likely to see it and read it whether it is posted for 60 days or longer. As 2 Sisters no longer operates the Riverside facility, the responsibility to post the notice falls to Fresh & Easy. While the notice will serve as a reminder to employees that the unfair labor practices 2 Sisters committed were in fact remedied, I find that Fresh & Easy’s posting of the notice for 60 days at the Riverside facility, coupled with relief described below, will effectuate the purposes of the Act. See *Hicks-Ponder Co.*, 174 NLRB 51, 52 (1969).

The Union next requests that the Respondents be required to post the Board’s employee rights notice poster for 5 years. See <http://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights>. On April 17, 2012, however, the Court of Appeals for the District of Columbia temporarily enjoined the NLRB’s rule requiring the posting of the employee rights notice under the Act. *National Assn. of Mfrs. v. NLRB*, 2012 WL 4328371 (D.C. Cir. Apr. 17, 2012). As the Board cannot

require any employer to post the notice until the matter is resolved, neither can I.

Next, the Union requests that former employees who worked at 2 Sisters but no longer work for Fresh & Easy receive a copy of the notice by mail. Because 2 Sisters' unlawful conduct, directed toward former employees as well as current employees, can be expected to have a chilling effect on employees' Section 7 rights, I shall order Respondents to mail copies of the notice herein to all former employees who were employed by the 2 Sisters or Fresh & Easy at any time from July 13, 2009, to the date of posting of the notice. See *Butte War Bonnet Hotel & Butte hotels, LLC*, 358 NLRB No. 83 (2012).

Finally, the Union requests that the Respondents be required to participate in a meaningful worker education program. 2 Sisters no longer operates the facility, and Fresh & Easy did not commit the unfair labor practices giving rise to these proceedings. Accordingly, I decline to grant this request.

2. Broad remedial order

The Union argues that I should recommend broad remedial order against Fresh & Easy. The Board has approved a broad remedial order where the employer displays "an attitude of opposition to the purposes of the Act to protect the rights of employees generally." *May Department Stores Co. v. NLRB*, 326 U.S. 376, 392 (1945). A broad cease-and-desist order is warranted when the employer "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979).

In a recent decision, *Fresh & Easy Neighborhood Market*, 358 NLRB No. 65 (2012), the Board found Fresh & Easy violated the Act by coercively interrogating an employee, creating the impression of surveillance, and prohibiting employees from discussing their discipline. Reversing the administrative law judge (ALJ), the Board also found that requiring employees to distribute a coupon flyer to customers that contained an apology for any disruption union protesters may have caused further violated the Act. At the hearing before the ALJ, the General Counsel, and the Charging Party had sought a broad remedial order, pointing to other recent Board decisions. Specifically, in *Fresh & Easy Neighborhood Market*, 356 NLRB No. 85 (2011), modified on other grounds 2011 WL 1038028 (Mar. 22, 2011), enfd. mem. 459 Fed. Appx. 1 (D.C. Cir. 2012), the Board found that during an organizing drive at Respondent's Las Vegas stores Fresh & Easy unlawfully: (1) interrogated employees; (2) created the impression of surveillance; and (3) promulgated and maintained an unlawfully overbroad no-distribution rule. In *Fresh & Easy Neighborhood Market*, 356 NLRB No. 90 (2011), modified on other grounds 2011 WL 1038028 (Mar. 22, 2011), enfd. mem. 459 Fed. Appx. 1 (D.C. Cir. 2012), the Board found that, at its Spring Valley, California store, Fresh & Easy unlawfully: (1) promulgated and maintained a rule prohibiting employees from talking about the Union while working; (2) prohibited employees from talking about their discipline with other employees while working; and (3) invited employees to quit their employment as a response to their protected activities. ALJ Lana H. Parke had determined that, because of the "corporate oversight of the labor relations

of individual stores and the repetition of conduct already found unlawful by the Board," a broad notice was appropriate. Because Judge Parke did not find that requiring employees to distribute coupon flyers to its customers was a violation, she did not order corporatewide posting or distribution of the Board's notice to Fresh & Easy's customers. She also declined to impose the remedy of notice reading to employees, finding the "unlawful conduct found in this case does not constitute such serious, persistent, and widespread unfair labor practices as to require the notice to be read aloud." *Id.* slip op. at 15.

The Board modified Judge Parke's decision and, even though it found an additional violation, declined to impose a broad remedial order. With the exception of the coupon flyer violation, the Board reasoned, "all of the violations were committed solely by Eagle Rock Store Manager Pablo Artica." *Id.* slip op. at 3. The Board determined that a notice covering all of the violations must be posted only at the Eagle Rock store, and a notice specific to the coupon-flyer violation must be posted at the 15–20 other stores where employees were required to distribute the flyer. The Union filed a request for reconsideration, and the Board again ruled that a broad cease-and-desist order was not warranted. *Fresh & Easy Neighborhood Market, Inc.*, 2012 WL 4424622 (Sept. 25, 2012).

The only changed circumstance between the Union's request for reconsideration in *Fresh & Easy Neighborhood Market*, 358 NLRB No. 65 (2012), and the instant decision is that I am now finding that Fresh & Easy is jointly and severally liable to remedy 2 Sisters' unfair labor practices under *Golden State*, with the exception of the issues that were settled, i.e., reinstatement, backpay, and personnel or other employment records pertaining to Trespalacios. As the Board stated in its order denying reconsideration, "we observe that the Respondent's refusal to comply with the Board's orders before enforcement does not show a proclivity to violate the Act. See *Longshoremen ILWU Local 151 (Port Townsend)*, 294 NLRB 674, 675 fn. 8 (1989) ('Board orders are not self-enforcing, and . . . , until such orders are enforced by a United States court of appeals, no penalties are incurred for disobeying them.'). 2012 WL 4424622. The Union also cites to pending cases, but the Board has rejected reliance on these when determining the appropriate remedial order. *Id.* (citing *Electrical Workers Local 98 (Total Cabling Specialists)*, 339 NLRB 470, 470 fn. 2 (2003)). Considering the unfair labor practices decision that gave rise to the instant compliance proceeding did not result in a broad remedial order from the Board, coupled with the Board's decisions, detailed above, declining to impose a broad order, I must decline the Union's request.⁸

⁸ To the extent 2 Sisters maintained the work rules at any facilities other than the Riverside plant, however, it shall be required to rescind the rule and post a notice at those facilities. See *Long Drug Stores of California*, 347 NLRB 500, 501 (2006) ("The Board has 'consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.") (quoting *Guardsmark, LLC*, 344 NLRB 809, 812 (2005)); *Jack in the Box Distribution Center Systems*, 339 NLRB 40 (2003) ("[W]e deem it an appropriate remedial measure to require that

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CONCLUSIONS OF LAW

1. Respondent Fresh & Easy is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act; Respondent 2 Sisters was an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act at the time of the unfair labor practice proceedings.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent 2 Sisters violated Section 8(a)(1) of the Act by promulgating and maintaining overbroad work rules and by promulgating and maintaining a mandatory arbitration policy that required employees to waive their right to file charges with the Board.

4. Respondent 2 Sisters violated Section 8(a)(3) and (1) of the Act by terminating employee Xonia Trespalacios because she engaged in union or other concerted protected activities and to discourage employees from engaging in these activities.

5. Respondent Fresh & Easy is a *Golden State* successor to 2 Sisters and is jointly and severally liable to remedy 2 Sisters' unfair labor practice violations about which it had knowledge when it purchased 2 Sisters.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a) (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent 2 Sisters maintained unlawful rules prohibiting unauthorized soliciting of contributions, unauthorized distribution of printed matter and the "inability or unwillingness to work harmoniously with other employees," as well as an unlawful policy requiring employees to submit all employment disputes and claims to binding arbitration, and having found that the Respondent Fresh & Easy is a *Golden State* successor, I shall order the Respondent 2 Sisters to rescind the rules and policy in any facility that continues to operate in the United States. To the extent Fresh & Easy adopted the rules and policy at issue after purchasing the Riverside facility from 2 Sisters, I shall order Fresh & Easy to rescind the rules and policy. Consistent with *Guardsmark, LLC*, 344 NLRB 809, 811–812 (2005), the Respondent 2 Sisters, in any facility that falls within the Board's jurisdiction, may comply with the Order by rescinding the unlawful provisions and republishing its rules of conduct and employee handbook without them. The Respondent Fresh & Easy may comply with the Order by rescinding any unlawful provisions it adopted or continued when it purchased 2 Sisters' Riverside facility and republishing its rules of conduct and employee handbook (or any corollary rules, handbooks, or similar documents containing the rules or policy) without them. Recognizing that republishing the rules of conduct, employee handbook, or other similar documents housing the rules/policy could entail significant costs, the Respondents may supply the employees either with rules of conduct, employee handbook, or other applicable inserts stating

the rescission of the provision, and the posting of the notice, be coextensive with the Respondent's application of its handbook.").

that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the rules of conduct, employee handbook, or other applicable documents without the unlawful provisions. Thereafter, any copies of the rules of conduct, employee handbook, or other applicable documents that are printed with the unlawful rules must include the new inserts before being distributed to employees. *Id.* at 812, fn. 8.

All issues regarding backpay, reinstatement and removal of any reference to the unlawful discharge of Trespalacios in Respondent 2 Sisters' personnel records have been settled. To the extent that Fresh & Easy acquired personnel records pertaining to Trespalacios, it shall be ordered to remove any reference to 2 Sisters' unlawful termination. In addition, because the Board found that 2 Sisters' discharge of Trespalacios was unlawful, Fresh & Easy, as 2 Sisters' successor, shall be required to post a notice of violation, as set forth herein. See *Golden State Bottling Co. v. NLRB*, *supra* at 184 (When new employer comes in as successor, "employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies.").

In view of the fact that Respondent 2 Sisters sold its business to Respondent Fresh & Easy, I shall order Respondent 2 Sisters to mail a copy of the attached notice marked "Appendix B" to the last known addresses of its former employees who were employed at any time between February 1, 2009, and June 28, 2010, in order to inform them of the outcome of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The National Labor Relations Board orders that the Respondents, Riverside, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a work rule prohibiting unauthorized soliciting of contributions on company premises.

(b) Maintaining a work rule prohibiting distribution of printed matter on company premises without permission.

(c) Maintaining a work rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees."

(d) Maintaining a policy requiring its employees to agree to submit all employment disputes and claims to binding arbitration as a condition of employment.

(e) Discharging or otherwise discriminating against employees for supporting United Food and Commercial Workers International Union, Local 1167 or any other labor organization.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If 2 Sisters maintains the work rule prohibiting unauthorized soliciting of contributions on company premises at any remaining facility in the United States, or if Fresh & Easy has adopted or otherwise continued 2 Sisters' work rule prohibiting unauthorized soliciting of contributions on company premises, rescind such work rule.

(b) If 2 Sisters maintains the work rule prohibiting distribution of printed matter on company premises without permission at any remaining facility in the United States, or if Fresh & Easy has adopted or otherwise continued 2 Sisters' work rule prohibiting distribution of printed matter on company premises without permission, rescind such work rule.

(c) If 2 Sisters maintains the work rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees" at any remaining facility in the United States, or if Fresh & Easy has adopted or otherwise continued 2 Sisters' work rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees," rescind such work rule.

(d) If 2 Sisters maintains the policy requiring its employees to agree to submit all employment disputes and claims to binding arbitration as a condition of employment at any remaining facility in the United States, or if Fresh & Easy has adopted or otherwise continued 2 Sisters' policy requiring its employees to agree to submit all employment disputes and claims to binding arbitration as a condition of employment, rescind such policy.

(e) If 2 Sisters maintains any of the rules or policies found to be unlawful at any remaining facility in the United States, or if Fresh & Easy has adopted or otherwise continued any of 2 Sisters' rules or policies found to be unlawful, furnish all current employees with inserts for the current rules of conduct, employee handbook, or other document(s) that (1) advise that the unlawful rules and policy have been rescinded, or (2) provide the language of lawful rules or policy; or publish and distribute revised rules of conduct and an employee handbook that (1) do not contain the unlawful rules and policy, or (2) provide the language of lawful rules or policy.

(f) If Fresh & Easy has maintained any records regarding the unlawful termination of Trespalacios, within 14 days from the date of this Order, it shall remove from its files any reference to the unlawful discharge.

(g) Within 3 days of the removing any reference to the unlawful termination of Trespalacios from its records, and/or ensuring no such records exist, Fresh & Easy shall notify Trespalacios that it does not maintain any records regarding her unlawful termination and that the discharge will not be used against her in any way.

(h) Within 14 days after service by the Region, Respondent Fresh & Easy shall post at its Riverside, California facility copies of the attached notice, in English and Spanish, marked "Ap-

pendix A."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent Fresh & Easy's authorized representative, shall be posted by Respondent Fresh & Easy and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent Fresh & Easy customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent Fresh & Easy to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent Fresh & Easy has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2009.¹¹

(i) Within 14 days after service by the Region, Respondent 2 Sisters shall duplicate and mail, at its own expense and after being signed by Respondent 2 Sisters' authorized representative, copies of the attached notice marked "Appendix B"¹² to all former employees who were employed by the Respondent 2 Sisters at any time between February 1, 2009, and June 28, 2010. For former employees who ceased working for Fresh & Easy after June 28, 2010, Fresh & Easy shall duplicate and mail the notice marked "Appendix A" in the same manner.

(j) Within 21 days after service by the Region, Respondents shall each file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. November 21, 2012

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹¹ To the extent that Respondent 2 Sisters continues to operate any facility in the United States where employees have been subjected to the work rules and policy found to be unlawful, a notice identical to App. B but without reference to the unlawful discharge of Trespalacios shall be posted at any such facility for the same time period and in the same manner.

¹² See fn. 10, *supra*.

2 SISTERS FOOD GROUP, INC.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a work rule prohibiting unauthorized soliciting of contributions on company premises.

WE WILL NOT maintain a work rule prohibiting distribution of printed matter on company premises without permission.

WE WILL NOT maintain a work rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees."

WE WILL NOT maintain a policy requiring employees to agree to submit all employment disputes and claims to binding arbitration as a condition of employment.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Food and Commercial Workers International Union, Local 1167, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

To the extent we adopted or otherwise maintained our predecessor employer's unlawful work rules and policy set forth above, WE WILL rescind them.

To the extent we adopted or otherwise maintained our predecessor employer's unlawful work rules and policy set forth above, WE WILL furnish all of you with inserts for the current edition of the rules of conduct and employee handbook or other applicable document(s) that (1) advise that the unlawful provisions, above, have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised rules of conduct and employee handbook that (1) do not contain the unlawful provisions, or (2) provides the language of lawful provisions.

WE WILL, within 14 days from the date of the Board's Order, ensure that our files do not contain any reference to the unlawful discharge of Xonia Trespalacios, and remove any such references if they exist. Within 3 days thereafter, WE WILL notify her in writing that this has been done and that the discharge will not be used against her in any way.

FRESH & EASY NEIGHBORHOOD MARKET, INC.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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WE WILL NOT maintain a policy requiring employees to agree to submit all employment disputes and claims to binding arbitration as a condition of employment.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Food and Commercial Workers International Union, Local 1167, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the work rules and policy set forth above.

WE WILL furnish all of you with inserts for the current edition of the rules of conduct and employee handbook or other applicable document(s) that (1) advise that the unlawful provisions, above, have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised rules of conduct and employee handbook that (1) do not contain the unlawful provisions, or (2) provides the language of lawful provisions.

We have removed from our files any reference to the unlawful discharge of Xonia Trespalacios, and have notified her in writing that this has been done and that the discharge will not be used against her in any way.

2 SISTERS FOOD GROUP, INC.